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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 924

BALDWIN BRACELET CORP., a corporation, and NATHAN GOODMAN and ANNE GOODMAN, individually and as officers of said corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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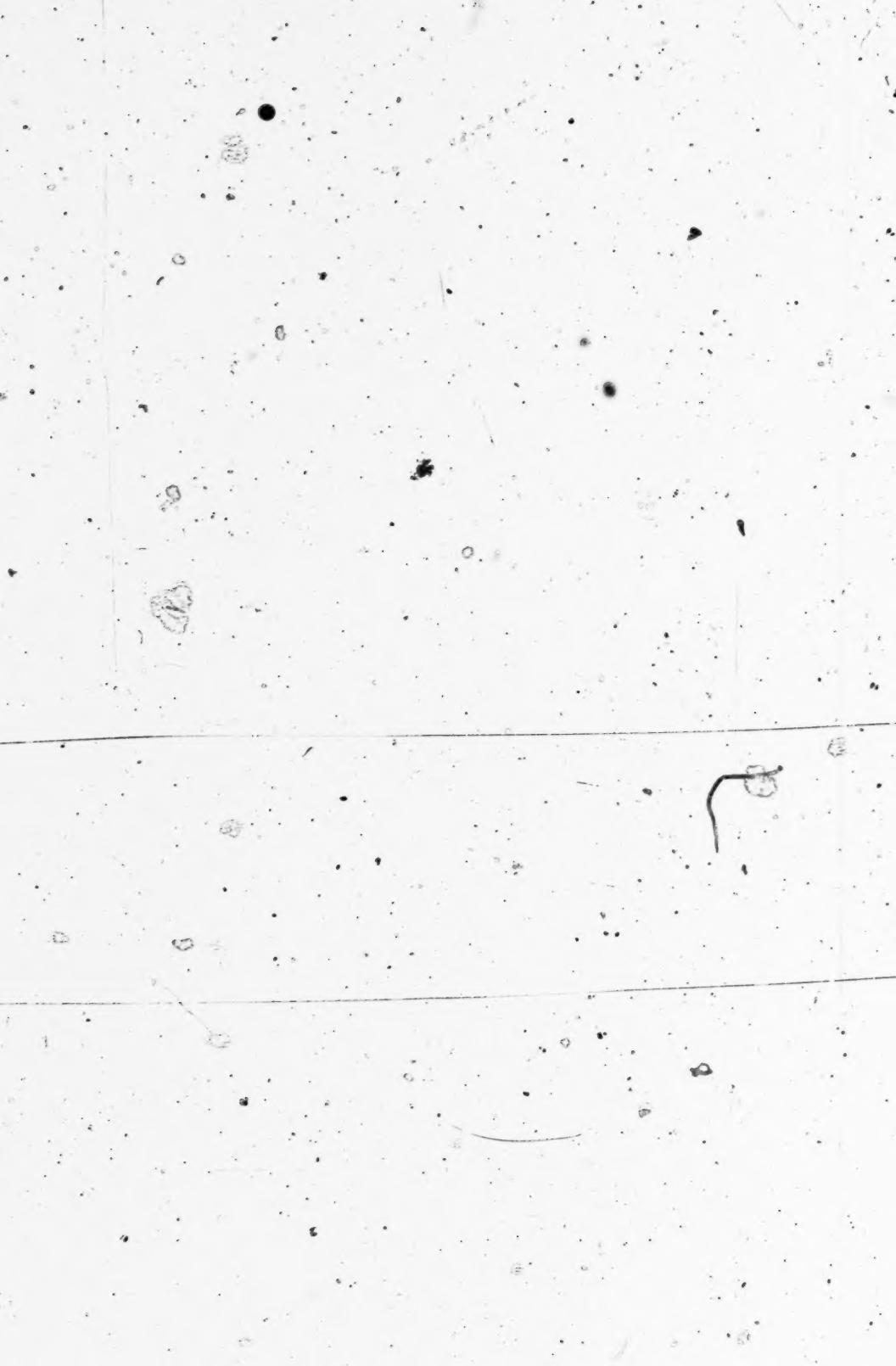

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	6
APPENDIX:	
A. THE OPINION BELOW	7
B. STATUTES	11
C. OPINION IN L. HELLER & SONS CO., INC. v. FEDERAL TRADE COMMISSION, 191 F. 2d 954	14
D. 98 TREASURY DECISION 55804 (2)	19

CITATIONS

Cases:

L. Heller & Sons Co., Inc. v. Federal Trade Commission, 191 F.2d 954	3, 4, 5

Statutes:

Title 15, U.S.C., Sec. 45	2
Title 19, U.S.C., Sec. 1301	2
Title 19, U.S.C., Sec. 1304	2
Title 19, U.S.C., Sec. 1304 (a)	2, 5
Title 19, U.S.C., Sec. 1304 (c)	2
Title 19, U.S.C., Sec. 1304 (d)	2
Title 19, U.S.C., Sec. 1304 (e)	2
19 Code of Federal Regulations 11:10 (b) (2)	2
98 Treasury Decisions 55804 (2)	2

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 19, 1963.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia # 17,701, Decided Dec. 19, 1963 (Appendix A, infra) is reported in —— F.2d ——.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was rendered on December 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Did the Federal Trade Commission exceed its authority when it ordered petitioners to mark, as products of Hong Kong, their articles imported from the United States Virgin Islands, when there existed prior rulings made by the Treasury Department pursuant to an act of Congress designed to encourage the growth of industry in the United States Virgin Islands and which act forbids under penalty these same articles from being so marked?

STATUTORY PROVISIONS INVOLVED

Title 15, U.S.C., Sec. 45; Title 19, U.S.C., Sec. 1301; Title 19, U.S.C., Sec. 1304; Title 19, U.S.C., Sec. 1304 (a); Title 19, U.S.C., Sec. 1304(c); Title 19, U.S.C., Sec. 1304(d); Title 19, U.S.C., Sec. 1304(e); 19 Code of Federal Regulations 11:10(b)(2); 98 Treasury Decisions 55804(2).

STATEMENT OF THE CASE

This is a proceeding by the Federal Trade Commission against Nathan and Anne Goodman, husband and wife, and stock holders of Baldwin Bracelet Corp. Baldwin is engaged in the sale and distribution of metal expansion watch bracelets in the United States which are manufactured by an affiliated corporation in the Virgin Islands.

Baldwin was charged in a complaint issued by the Commission (JA 67)[1] with failing to disclose that the watch bracelets were made, in whole or in substantial part, in Hong Kong (JA 68).

The Federal Trade Commission concluded by its order that Baldwin violated Section 5 of the Federal Trade Commission Act (enacted to prevent consumer deception). This finding was made solely on the basis of practices undertaken by Baldwin in compliance with another Federal statute and pursuant to the directions of a coordinate Federal agency also charged with the duty of preventing consumer deception, namely the Treasury Department acting through its agency, the Bureau of Customs.[2]

An appeal was taken by petitioners to the United States District Court for the District of Columbia Circuit. The opinion of that Court (Appendix A) affirmed the order of the Federal Trade Commission. The opinion ignores the problems created by the agency conflict for the petitioners and many other businessmen so situated. The Court below supports its ruling on the basis of *L. Heller & Sons Co., Inc.* v. *Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951).[3]

REASONS FOR GRANTING THE WRIT

A growing number of manufacturers and importers of articles from the Virgin Islands are confronted with the problem faced by petitioners. They are compelled to do by the Federal Trade Commission what they are forbidden to do by the Treasury Department. There has never been a decision by the United States Supreme

[1] This and similar references are to the Joint Appendix.

[2] Pertinent provisions of these Acts are printed in Appendix B.

[3] For convenience, the opinion of the court in *Heller* is printed as Appendix C.

Court to determine the effect of a Treasury Department ruling made prior to a Federal Trade Commission ruling and in conflict with it. The multitude of cases reaching the appellate courts concerning this point are disposed of on the basis of the ruling in *Heller*. There was no petition for a writ in the *Heller* case.

Even granting the validity of *Heller*, there are important distinctions between *Heller* and *Baldwin*:

1. *Heller* presented the question whether specific foreign marking provisions of the Tariff Act, in effect, withdrew from the Federal Trade Commission its implied authority under the general provisions of the Federal Trade Commission Act to regulate such marking. The only question involved related to the jurisdiction of the Federal Trade Commission to require markings at all, and the court merely held that it had such jurisdiction since the Tariff Act did not, in itself, withdraw the right of the Federal Trade Commission to regulate markings. The sole issue was whether the Tariff Act and Federal Trade Commission Act were repugnant to each other in this area. The court decided that they were not. However, *Heller* did not involve the question of a direct conflict of rulings of two different Government agencies, one acting under the Tariff Act and the other acting under the Federal Trade Commission Act. The instant case raises this issue, and *Baldwin* is caught between contrary decisions of these two Government agencies. To comply with the order of the Federal Trade Commission, Baldwin must necessarily violate the directions of the Treasury Department.

2. In *Heller*, the petitioners imported imitation pearls from foreign countries in bulk. The packages which contained the pearls were marked with tags or labels disclosing the country of origin. After the pearls were received in the United States, *Heller* removed the tags or labels in the process of fabricating the loose pearls

into necklaces and other articles of jewelry. *Heller* distributed the finished products in interstate commerce without any tags or labels indicating that the pearls were of foreign origin.

In *Baldwin* there is no contention that tags or labels were removed. On the contrary, in *Baldwin* the petitioners are being ordered to attach labels that would be in conflict with Treasury Department rulings forbidding the labels ordered by the Federal Trade Commission.

Heller assumes that there is no conflict between the rulings of Government agencies. In *Baldwin* there definitely is a conflict. In many related situations the Treasury Department has specifically forbidden markings of the type which the Federal Trade Commission is ordering *Baldwin* to use. An illustration of the exact manner in which the Treasury Department regulates marking is printed as Appendix D. *Baldwin* is in the identical position as the manufacturers of laminated piece goods who, by the quoted Treasury Decision, are forbidden to identify their products except as specified.

3. *Heller* incorrectly assumes that Treasury Department rulings are made for purposes different from the Federal Trade Commission rulings. Treasury Department rulings, just as Federal Trade Commission rulings, are intended to protect the *ultimate purchaser* from deception. U.S.C., Title 19, Sec. 1304(a).

A ruling by the United States Supreme Court would finally put to rest the doubts and speculations plaguing businessmen engaged in the importation of products from the Virgin Islands.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB A. STEIN,
Counsel for Petitioners
Baldwin Bracelet Corp., et al.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,701

BALDWIN BRACELET CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition to Review and Set Aside an Order of the Federal Trade Commission

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Decided December 19, 1963

Before PRETTYMAN, Senior Circuit Judge, and WILBUR K. MILLER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This case involves a petition to review and set aside an order of the Federal Trade Commission. The relevant facts are as follows:

Petitioner, Baldwin Bracelet Corporation, with headquarters and principal office in New York City, is engaged in the production and sale of expansion watchbands, for which Baldwin purchases the necessary metal in the United States and exports it to Honk Kong, where it is fabricated into bracelet linkages. Subsequently, an affiliate of Baldwin, Janaco Manufacturing Corporation of

St. Thomas, Virgin Island (not a party hereto), imports those goods and the remaining parts from Hong Kong to the Virgin Islands, where tube ends are affixed to the otherwise finished bands. The bands are then degreased, polished and shipped to Baldwin in the United States.

On March 14, 1961, the Commission issued a complaint, in part charging Baldwin with Violating §5(a)(1) of the Federal Trade Commission Act [1] by not marking its watchbands in a manner indicating their having been made substantially in Hong Kong.[2] After a hearing, the hearing examiner found that the product was manufactured in substantial part in Hong Kong; that, in the absence of markings to the contrary, the purchasing public presumes articles are of domestic origin; that the purchasing public has a preference for products of domestic origin or manufacture; and that, therefore, in selling its product without indicating foreign origin, Baldwin was engaged in "unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act."

The Commissioner agreed with the hearing examiner and on October 2, 1962, issued and thereafter served upon Baldwin an order providing for the filing of objections to the proposed final order. On December 18, 1962, Baldwin having filed no objections within the time provided, the Commission issued its final order requiring, in part, that Baldwin disclose "the country or place of foreign origin

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[1] 66 STAT. 632 (1952), 15 U.S.C. § 45(a)(1) (1958): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

[2] The complaint also involved, as did the Commission's decision and order, Baldwin's advertising a full and unconditional guarantee of its products. Baldwin does not challenge that part of the Commission's order, however, and the facts related to that aspect of the Commission's proceedings are not relevant to the disposition of this case.

or fabrication thereof on the products themselves, by making or stamping on an exposed surface, or on a label or tag affixed thefeto . . . ."

Baldwin here argues that since an earlier determination by the Treasury Department, Bureau of Customs, pursuant to § 304 of the Tariff Act of 1930, as amended,[3] permitted its goods to enter this country duty free and unmarked as to country of origin, the Commission is without authority to require Baldwin to so mark its goods. We disagree.

Baldwin's argument is based on the theory that both § 304 of the Tariff Act of 1930, as amended, and § 5(a)(1) of the Federal Trade Commission Act are intended to protect the purchasing public, and therefore, under a "priority of jurisdiction," the earlier Treasury ruling precluded the exercise of jurisdiction by the Commission over the same subject matter. The assumption regarding the purpose of the statutes, however, is erroneous. Section 304 of the Tariff Act is a limited statute governing the conditions under which foreign goods shall enter the United States, while § 5(a)(1) of the Federal Trade Commission Act is a general grant to the Commission of jurisdictional authority over the marketing of goods in interstate commerce. Thus, *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951) squarely decided that the authority granted the Secretary of the Treasury by § 304 of the Tariff Act of 1930, as amended in 1938, was not intended to repeal § 5 of the Federal Trade Commission Act, nor to diminish the jurisdiction and authority of the Commission with relation to such practices as are involved here.

Petitioner's assertion that *United States* v. *Mersky*, 361 U.S. 431 (1960), vitiates the holding in *Heller* is ill-conceived, as a mere reading of the opinion in the *Mersky*

[3] 52 STAT. 1077 (1938), 19 U.S.C. § 1304 (1958).

case will demonstrate. Equally unpersuasive is the argument that § 301 of the Tariff Act, as amended,[4] enacted after the *Heller* decision, was intended to protect the ultimate consumer and thus precludes the exercise of jurisdiction by the Commission in this case. That statute, like § 304, relates to the imposition of duties, and likewise does not delimit the jurisdiction of the Commission in this case.

It follows, therefore, that the petition must be and is hereby denied, and the order of the Commission is affirmed and will be enforced.

So ordered.

[4] 68 STAT. 1139 (1954), 19 U.S.C. § 1301(a) (1958).

APPENDIX B

STATUTORY PROVISIONS INVOLVED

U.S.C., Title 15, Sec. 45 provides:

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. 66 Stat. 632 (1952).

(a) (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. 66 Stat. 632 (1952).

U.S.C., Title 19, Sec. 1301 provides:

(a) There shall be levied, collected, and paid upon all articles coming into the United States from any of its insular possessions, except Puerto Rico, the rates of duty which are required to be levied, collected and paid upon like articles imported from foreign countries; except that all articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession of the United States, or of both, which do not contain foreign materials to the value of more than 50 per centum of their total value . . . shall be admitted free of duty upon compliance with such regulations as to proof of origin as may be prescribed by the Secretary of the Treasury.

U.S.C., Title 19, Sec. 1304 provides:

(a) . . . every articles of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article . . . will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the coun-

try of origin of the article. The Secretary of the Treasury may issue regulations . . .

(a) (1). Determine the . . . words . . . which shall be acceptable as indicating the country of origin. . .

(c) If at the time of importation any article (or its container, as provided in subsection (b) of this section) is not marked in accordance with the requirements of this section, and if such article is not exported or destroyed or the article (or its container, as provided in subsection (b) of this section) marked after importation in accordance with the requirements of this section (such exportation, destruction, or marking to be accomplished under customs supervision prior to the liquidation of the entry covering the article, and to be allowed whether or not the article has remained in continuous customs custody), there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause. Such duty shall be levied, collected, and paid in addition to any other duty imposed by law and whether or not the article is exempt from the payment of ordinary customs duties. The compensation and expenses of customs officers and employees assigned to supervise the exportation, destruction, or marking to exempt articles from the application of the duty provided for in this subsection shall be reimbursed to the Government by the importer.

(d) No imported article held in customs custody for inspection, examination, or appraisement shall be delivered until such article and every other article of the importation (or their containers), whether or not released from customs custody, shall have been marked in accordance with the requirements of this section or until the amount of duty estimated to be

payable under subsection (c) of this section has been deposited. Nothing in this section shall be construed as excepting any article (or its container) from the particular requirements of marking provided for in any other provision of law.

(e) If any person shall, with intent to conceal the information given thereby or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark required under the provisions of this chapter, he shall, upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both. June 17, 1930, c. 497, Title III, § 304, 46 Stat. 687; June 25, 1938, 5 p. m. E. S. T., c. 679, § 3. 52 Stat. 1077; Aug. 8, 1953, c. 397, § 4(c), 67 Stat. 509.

19 Code of Federal Regulations 11:10 provides:

(b) (2) Exceptions to marking requirements. The following articles . . . are not subject to marking requirements . . . Products of possessions of the United States.

APPENDIX C

L. HELLER & SON, INC., ET AL.

v.

FEDERAL TRADE COMMISSION

191 F. 2d 954

(Court of Appeals, Seventh Circuit. Oct. 30, 1951)

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges.*

KERNER, *Chief Judge:*

Petitioners ask us to review and set aside five cease and desist orders of the Federal Trade Commission. The orders were based upon separate complaints charging petitioners with engaging in unfair and deceptive acts and practices in violation of section 5 (a) of the Federal Trade Commission Act, 15 U. S. C. A., section 45 (a). By stipulation the cases were consolidated for the hearing, taking of testimony, and other purposes, and for the purpose of this review.

Petitioners import imitation pearls from foreign countries, either on strings, graduated or ungraduated as to sizes, or in bulk, marked with tags or labels either on the strings or the containers so as to disclose the name of the country in which they originated. After the pearls are received in the United States petitioners remove the tags or labels, fabricate the pearls into necklaces and other articles of jewelry, and distribute and sell them in interstate commerce without any tag or label indicating that the imitation pearls are of foreign origin, and cause the products to be sold to the public without revealing the fact of their foreign origin.

A substantial portion of the purchasing public has a general preference for products produced in the United States by American labor and containing domestic materials, where other considerations such as style and quality are equal, and has a prejudice against imported products. Imitation pearls produced in the United States are not generally distinguishable in quality and appearance from imported imitation pearls, and both are used for the same purpose in the production of jewelry. And the purchasing public, in the absence of a tag, mark, or other identification thereon by which foreign origin is indicated, understands and believes that necklaces of imported imitation pearls offered for sale and sold in the United States are products of domestic manufacture.

The Commission found that the selling and distributing of the imported imitation pearls without any labeling or other mark to indicate the foreign source or origin of such pearls have the capacity and tendency to mislead and deceive purchasers and prospective purchasers into the false and erroneous belief that such jewelry products are wholly of domestic manufacture, and places in the hands of retailers of such jewelry products a means and instrumentality by which members of the purchasing public may be misled and deceived into the false and erroneous belief that such products are wholly of domestic origin. In its opinion the Commission stated: [956] " * * * imitation pearls which have been fully manufactured in foreign countries are imported by [petitioners] * * * and incorporated in necklaces and other articles of jewelry, which are then resold without marks to disclose the foreign origin of the imitation pearls. When such imitation pearls are used in necklaces they represent the principal component and the part which makes the necklaces valuable to the consumer. The consumer purchases an imitation-pearl necklace not because of the string which holds the pearls together or the clasp which joins its ends, but because of the imitation pearls which are thus assembled and

made useful as ornaments. The same is true of other articles of jewelry composed in substantial part of imitation pearls. Their only utility is for ornamentation and for that purpose imported imitation pearls require only proper assembling after being brought into this country. After such assembling, however, they still retain their essential characteristics as products of foreign manufacture."

Based upon these facts, the Commission ordered petitioners to cease and desist from "Offering for sale or selling said products without affirmatively and clearly disclosing theron, or in immediate connection therewith, the country of origin of such imported imitation pearls."

In this court petitioners contend that the Commission was without jurisdiction or authority to prohibit the practices interdicted by the cease and desist orders entered herein. The argument is that Congress, by the enactment of the Tariff Act of 1930, as amended in 1938 (52 Stat. 1077, 19 U. S. C. A., sec. 1304), requiring that every article of foreign origin imported into the United States shall be marked so as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article, and authorizing the Secretary of the Treasury to regulate such marking, withdrew from the Commission jurisdiction or authority to regulate such marking.

We commence our study of the instant case with the knowledge that the Commission may require affirmative disclosures where necessary to prevent deception, and that failure to disclose by mark or label material facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase, is an unfair trade practice violative of section 5 of the Federal Trade Commission Act, *Haskelite Manufacturing Co. v. Federal Trade Commission*, 127 F. 2d 765 [34 F. T. C. 1855; 3 S. & D. 485] and that when

violation of section 5 has been shown, there is no necessity of considering whether a provision of the tariff act is similarly applicable. *Segal* v. *Federal Trade Commission*, 142 F. 2d 255 [38 F. T. C. 867; 4 S. & D. 150].

Petitioners admit that section 5 of the act vests broad authority in the Commission to determine what constitutes and to prevent unfair or deceptive acts and practices in commerce. However, they say that the act "is a general statute using broad terms which could cover all types of deceptive acts and practices in commerce." They insist that the tariff act as amended is a specific statute concerned particularly with the problem of deceptive misrepresentations to the ultimate purchaser through the failure to use, or the insufficient use of, marks of origin on imported goods. They make the point that in considering provisions of two statutes dealing with the same subject matter, one general in scope and language, and the other specifically concerned with a particular portion of the subject matter, the statute containing the specific terms covering the given subject matter must prevail over the general language of the other statute, *Kepner* v. *United States*, 195 U.S. 100. And since Congress has expressly delegated authority over marks of origin to the Secretary of the Treasury, it necessarily withdrew regulatory jurisdiction over this subject from the Commission. Thus, the problem we are asked to solve is whether the Commission had jurisdiction to prohibit the practices herein involved.

It is true that in construing the meaning and scope of statutory provisions in order to determine the legislative intent or purpose, the entire legislative subject should be examined and every effort made to construe legislation so it will be consistent with other expressions of legislative intent and purpose, yet the law is that limitations on existing powers of the Federal Government must be clearly manifested by an Act of Congress, *United States*

v. *United Mine Workers of America*, 330 U. S. 258, 272, and repeal of those powers requires a clear expression of that purpose. Furthermore, repeals by implications are not favored, and may not be readily drawn from the language of the statute, or its legislative history. It is only where two laws are clearly repugnant to each other and both cannot be carried into effect that the latter of the two laws will prevail. *Posadas* v. *National City Bank*, 296 U. S. 497, and *United States* v. *Borden Company*, 308 U. S. 188.

As we have already observed, the Federal Trade Commission Act is a broad statute forbidding "unfair methods of competition" and "unfair or deceptive acts or practices" in interstate commerce. The tariff act is a limited statute on an entirely different subject—the conditions under which foreign goods shall enter the United States. It authorizes the Secretary of the Treasury to require that imported articles, under certain conditions, show the country of origin. In determining whether the amended Tariff Act of 1938 curtailed the then existing powers and authority of the Commission, it is important to consider what was before Congress at the time of the adoption of section 1304. In our opinion Congress, at the time it was considering the 1938 amendment to the tariff act, was concerned solely with the extent to which the Treasury Department, incidental to its collection of customs duties, should regulate the labeling of imported goods. Our examination of the amended tariff act discloses no language expressing an intention on the part of Congress to repeal section 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices, and since there exists no repugnancy between the two acts, we are impelled to the conclusion that the Commission had jurisdiction and authority to prohibit the practices herein involved.

A decree will be entered for enforcement of the orders to cease and desist. It is so ordered.

APPENDIX D.

98 Treasury Decisions 55804 (2), January 9, 1963:

"INSULAR POSSESSIONS

"T.D.55804 (2). *Marking, laminated piece goods.* —Manufactured in Virgin Islands are not required to be marked under the customs laws to show that they were made in the Virgin Islands or to show the country of origin of the component materials used in their manufacture. *Such laminated piece goods may not be marked to indicate that they are the product of an area other than the Virgin Islands,* nor may they be marked to indicate the United States as their country of origin in view of the exception of the Virgin Islands from the term 'United States' as defined in section 401 (k), Tariff Act of 1930, as amended. Bureau letters dated May 29, 1962, and December 17, 1962. (017.6)" (Emphasis supplied)